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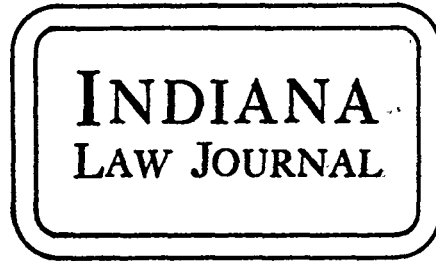
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Privacy and the Presentence Report*

WILLIAM P. McLAUCHLAN**

In recent years greater attention has been focused on the individual, his rights and his relationship to society. This trend has been reflected in the criminal justice system through an increasing emphasis on due process procedures, and on the rehabilitative rather than punishment aspects of the sentencing process.¹ The presentence report has been a major tool in implementing that individualized orientation. The need to tailor the sentence in a criminal case to fit the individual, rather than just the crime, has caused an increased use of the presentence report and a heavier reliance on the kind of information it contains. The kind of evidence used in the criminal trial is related to guilt, and is often not very useful to the sentencing judge when determining what sort of sentence to impose. The presentence report provides a social background and psychological portrait of the individual. Thus, it permits the judge to understand the individual better before imposing sentence.

In the United States, most trial court judges are authorized to request a presentence report, although specific requirements vary among jurisdictions. Some states require the presentence report,² some require it

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¹See Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., C. & P.S. 226 (1959); and D. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* ch. 2 (1977).

²ARIZ. CT. R. CRIM. P. 26.4 (1973); CONN. GEN. STAT. §54-109 (1958); DEL. CODE tit. X, §4331 (1974); 34 FLA. S. CT. R. CRIM. P. 3.7111 (West 1975); MASS. ANN. LAWS ch. 279 §4A (Michie Law Co-op 1978).

only in certain classes of crimes such as felonies,³ while still others leave the presentence report to the discretion of the judge.⁴ In some situations the trial judge may not wish to have a presentence report. This might be the case in a rural community where the judge knows the criminal and his background quite well,⁵ or where the guilty plea has been entered as the result of a plea bargain and thus the sentence recommended by the prosecutor is part of the bargain so the judge's sentencing discretion has been removed.⁶ However, presentence reports are used widely in most jurisdictions to provide the judge with a profile of the convicted criminal.

The actual form and content of the presentence reports vary with the jurisdiction and the particular interests of the sentencing judge, as well as what information is available to the investigating probation officer. However, some basic elements of the report are quite standard—even if they are not all clearly relevant to the sentencing decision.⁷ An appraisal of the particular offense involved, and the defendant's attitude toward the events, prior criminal record, character and financial profiles, social and psychological circumstances surrounding the crime and the individual, and some recommendation about the sentence which is based on the probation officer's professional evaluation of the specific case, are usually all present in presentence reports.⁸

There are no clear statutory, constitutional, or case-law requirements regarding the privacy of the information contained in the report. It is rather clear that the kinds of information and the evaluations involved in the presentence report are personal and individualized. Thus, the convicted criminal must disclose or others may disclose a great deal of personal information about him. Whether this disclosure is voluntary, as when the defendant seeks to persuade the judge to impose a light sentence, or involuntary, as when third parties disclose damaging infor-

³CAL. PENAL CODE § 1203 (West 1970); IND. CODE §35-8-1A-13 (Burns 1976); 41 MICH. COMP. LAWS ANN. §771.14 (1967); VT. CT. R. CRIM. & APP. P. 32(c) (1974).

⁴It is possible that presentence reports are prepared in some situations without any statutory authorization. However, in such cases, the courts have usually developed the requirement by common law or have adopted a court rule of procedure requiring presentence reports. See ARK. STAT. ANN. §43-2333 (1978); D.C. CT. R. 20 (1967); 10B GA. CODE ANN. §27-2709 (1972); 57 IOWA CODE ANN. §901.3 (West 1978); LA. CODE CRIM. PRO. ANN. art. 875 (West 1978); ME. CT. R. CRIM. P. 32 (1977); MD. ANN. CODE art. 41, §124 (1971).

⁵Lorenson, *The Disclosure to Defense of Presentence Reports in West Virginia*, 69 W. VA. L. REV. 159, 161 (1967).

⁶See, e.g., *People v. Williams*, 43 Ill. App. 3rd 675, 357 N.E.2d 182 (1976).

⁷An example would be the social security number of the defendant, which by itself is not revealing of anything significant about the defendant. The fact that the defendant had or did not have a social security number might be very important information, but what that number was is irrelevant.

⁸See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, DIVISION OF PROBATION, *THE PRESENTENCE INVESTIGATION REPORT*, Pub. No. 103 (1965); *The Selective Presentence Investigation Report*, 38 FED. PROB. 48 (Dec., 1974). See also Fogel, *The Fate of the Rehabilitative Ideal in California Youth Authority Disposition*, 15 CRIME AND DELINQUENCY 482 (1969); Katkin, *Presentence Reports: An Analysis of Uses, Limitations, and Civil Liberties Issues*, 55 MINN. L. REV. 15, 17-19 (1970); Steele, Jr., *Counsel Can Count in Federal Sentencing*, 56 A.B.A.J. 37 (1970).

mation or evaluations, the information is personal and often quite intimate. It could be argued that the convicted criminal has waived his right to privacy regarding these materials since he has been convicted of a crime and is subject to the imposition of whatever criminal sanction society (in the form of the sentencing judge) deems appropriate. If the criminal wishes to be treated lightly, then he must provide the judge with the information justifying mitigation of the sentence and thus he voluntarily gives up his privacy to obtain the lighter sentence. However, there is also the point that the defendant or his counsel should have the opportunity to check the information in the report and raise questions about its accuracy, rebut detrimental information, by cross-examination or by adding countervailing information, or else some of the basic elements of fairness in the criminal justice process are not being met.

The questions which are explored in this study focus on the problem of privacy of information contained in the report and the kind of access which various individuals have to that information during the course of the sentencing process. The first portion of this report focuses on the literature which relates to presentence report privacy, and the kinds of questions which have been treated in previous studies. The second portion focuses on the statutory law relating to disclosure of presentence reports in the various jurisdictions of the United States. The last two sections focus on the practices followed in American jurisdictions by trial judges and probation officers who must operate with the presentence report and the problems of privacy which arise in the context of sentencing persons convicted of crimes.

THE DEBATE OVER PRIVACY AND THE PRESENTENCE REPORT

Presentence report privacy is composed of two major issues. Each issue has been treated to some extent in the past, but both are significant in terms of current interest in the subject. The first area involves disclosure of the presentence report to the defendant or his counsel. A substantial amount of the literature on the subject of privacy focuses on various aspects of this question. The second, and much less studied set of questions, focuses on the access which others—public officials or private citizens—have to the information contained in the presentence report.

Disclosure of the Presentence Report to the Defense

In examining the first of these topics, the basic element of disclosure to the defendant involves letting the individual, personally, see the presentence report or the information contained in it.⁹ In modern legal

⁹It should be emphasized that disclosure to the defendant and to defense counsel are not the same thing. Many of the provisions of state statutes, discussed in later sections of this report, allow defense counsel to see the report in confidence, while withholding the report from the defendant. The practices of some judges is to also disclose the report to counsel but not to the defendant.

thinking this disclosure to the defendant can be accomplished by allowing defendant's lawyer to examine the report. Whether this is adequate disclosure in terms of the defendant will be discussed below. However, it should be emphasized here that the issue of privacy revolves around the defendant's access to the contents of the report. It concerns him and his life, and it will determine or influence the disposition of his case when the judge sentences him. That personal connection differs from simply countering the information in the report which can be accomplished without, necessarily, allowing the defendant to see the report.

The arguments in favor of providing the defendant with access to the report focus around the need to correct informational errors, the right to cross-examine the probation officer, the need to provide rebuttal evidence, or the right to suggest countervailing considerations (mitigating circumstances) which have been excluded from the report by the probation officer. It is well established that the factual information in the report must be accurate, or else a sentence based on the report cannot stand.¹⁰ The procedure used to insure the accuracy varies. It can simply be that the court must be convinced that the report is accurate, even while denying disclosure of the report to the defendant. More elaborate procedures for correcting error involve allowing the defense to examine the report or some summary of it, so that the general factual outline of the report can be scrutinized by the criminal, and any errors, or points of dispute can be raised. This might be done administratively, without any judicial supervision, if the probation office provided a procedure for examination and correction of the presentence report. It might also be accomplished by means of a formal judicial proceeding in which the factual errors are specified by the defense and the probation officer is called upon to verify the facts. The more extreme forms of this correcting procedure would subject the probation officer who prepared the report to cross-examination on it,¹¹ or allow the defense to submit evidence to rebut the facts and provide evidence which would cause the judge to discount the sentence recommendation in the report or mitigate the sentence because of facts or circumstances which the report does not bring to light.

Part of the qualitative difference between disclosure of the report to the defendant and defense counsel is that the defendant, better than anyone else, may be able to identify inaccuracies in the report, and indicate to his counsel where additional witnesses or information might be found to counter the presentence report. In that sense, the procedural arrangements which allow the report to be examined by defense counsel,

¹⁰U.S. v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948).

¹¹E.g., Kuhl v. Dist. Co., 139 Mont. 536, 366 P.2d 347 (1961); VA. CODE §19.2-299 (Supp. 1978). See Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 IOWA L. REV. 161, 170 (1966) for an evaluation which suggests that much of the opposition to disclosure of the report is due to the reluctance of probation officers to subject themselves to cross-examination or public scrutiny regarding the report.

and which sometime require his confidential treatment of the report,¹² may not be adequate to achieve the essential requirement that the report contain no factual errors.

The opportunity to correct factual errors and the right to rebut material in the presentence report are also different. The correction of factual errors can be done with little or no judicial intervention, if the administrative agency which prepares the report can establish a procedure for disclosure and subsequent verification or investigation of items raised by the defense after examination. Rebuttal involves the presentation of positive evidence in order to establish, not so much that the facts are inaccurate, as that the sentence should reflect additional, mitigating evidence not contained in the report at all. Thus, rather than correcting errors in the report, rebuttal evidence goes to the substantive determination of sentence. However, these two considerations are also points on a continuum, when disclosure is the point of interest. It is only a matter of degree, whether the defendant can correct errors, or present additional evidence, after seeing the presentence report.

Additional arguments can be raised supporting disclosure of the presentence report. Some of these relate to the defendant personally. It can be argued that if the defendant can see that the criminal justice system is fair and considers all the information about him, he may be willing to accept the sentence in a more rehabilitative state of mind, than if the report is not disclosed to him.¹³ This argument presumes that the presentence report is correct and very exhaustive as initially prepared, and that it will need no corrections after disclosure. The degree to which the rehabilitative result may occur from disclosure is not well documented, but it does constitute one of the beliefs of penological theory.

An additional argument in favor of disclosing the report is that due process and fair treatment considerations require that the entire criminal process, not just the trial, reflect such an orientation toward fairness.¹⁴ This due process argument may be the most difficult to establish, since sentencing comes after the criminal trial (the procedural establishment of guilt). However, this argument has been cited by appellate courts in justifying disclosure.¹⁵ Furthermore, the argument has much emotional appeal and is supported by a number of U.S. Supreme Court decisions in the 1960's which adjusted criminal procedures to coincide with such a due

¹²Haynes v. State, 19 Md. A. 428, 311 A.2d 822 (1973). See Hincks, *In Opposition to Rule 34(c)(2), Proposed Federal Rules of Criminal Procedure*, 8 FED. PROBATION 3 (Oct.-Dec., 1944).

¹³See, Lehigh, *Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225, 238 (1969); Zastrow, *Disclosure of the Presentence Investigation Report*, 35 FED. PROBATION 21 (Dec., 1971).

¹⁴Gray, *Post Trial Discovery: Disclosure of the Presentence Investigation Report*, 4 U. TOLEDO L. REV. 1, 4 (1972); Guzman, *supra* note 11, at 164; Lehigh, *supra* note 13, at 238.

¹⁵State v. Green, 62 N.J. 547, 564, 303 A.2d 312, 321 (1973); Buchea v. Sullivan, 262 Ore. 222, 237, 497 P.2d 1169, 1176 (1972).

process/fairness perspective.¹⁶

In contrast to these arguments for disclosing the presentence report, a number of points have been offered to support non-disclosure of the report, at least to the defendant. First, detrimental comments by third parties and evaluations by the probation officer might injure or destory the defendant's self-image and dignity.¹⁷ This disclosure might also change the relationship between the defendant and third-party informants such as family members, relatives and friends who are questioned by the probation officer during the preparation of the report. Additionally, the need to protect informants from retribution or embarrassment by the defendant has been offered in support of non-disclosure.¹⁸ The probation officer who made the presentence report and recommendation, and who may later have the criminal placed under his supervision, might have a more difficult time getting compliance and cooperation from the criminal, if that person remembers the detrimental evaluation made by the officer at the time of sentencing.

Another argument which has been made is that disclosure of sources to the defendant or in open court will either shape the accuracy and quality of information in the report, or it will dry up "street" information sources.¹⁹ Some of these fears can be countered by simply disclosing the information to the defense while withholding the sources. However, this counter-argument may not hold when the information disclosed is of such a personal nature that the identity of the source is clear from the information.

Disclosure of the report might be used by some defendants as a means of delaying the sentencing process. Asking for time to prepare for cross-examination or rebuttal, will require postponement of sentencing in some circumstances.²⁰ The delay argument cannot be easily countered, since that may very well be the purpose of the defense tactics at sentencing. However, how much delay is possible depends on the sentencing procedures and the sentencing judge. The judge can prevent extensive delay

¹⁶See e.g., *In Re Gault*, 387 U.S. 1 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Mallory v. United States*, 354 U.S. 449 (1957).

¹⁷*Roche, Position for Confidentiality of the Presentence Investigation Report*, 29 ALB. L. REV. 206, 212 (1965); *Higgins, Confidentiality of Presentence Report* 28 ALB. L. REV. 12, 30 (1964); *Guzman, supra* note 1, at 169.

¹⁸*Lehrich, supra* note 13, at 238; *Roche, supra* note 17, at 212; *Guzman, supra* note 11, at 165; *Higgins, supra* note 17, at 30.

¹⁹*Guzman, supra* note 11, at 167; *Harkness, Due Process in Sentencing: A Right to Rebut the Presentence Report?*, 2 HASTINGS CONST. L. Q. 1065, 1068 (1975); *Higgins, supra* note 17, at 29; *Lehrich, supra* note 13, at 238; *Roche, supra* note 17, at 212.

²⁰*Higgins, supra* note 17, at 30; *Zastrow, supra* note 13. There are also circumstances in which it appears that the defense may be unable to raise substantial questions at sentencing because the report has not been disclosed sufficiently in advance to permit preparation. In this situation the defense may be intimidated into accepting, without objection, the presentence report. For a possible example of such a situation see, *Guglielmo v. State*, 318 So. 2d 526 (Fla. Dist. Ct. App. 1975).

by refusing requests for postponements unless the defense can convince the judge of the need for such a delay. Also the kind of procedure used in sentencing can structure delay. Thus, in a jurisdiction where cross-examination of the probation officer and the opportunity for rebuttal evidence is provided the delay will be substantially longer than where the report is presented to the defense some time in advance of sentencing and the defense must file written exceptions and requests for correction or verification prior to the sentencing hearing.

One last argument supporting non-disclosure is that the judge should have confidence in the probation officer preparing the report, and thus should not publicly question or doubt that professional by opening the report to close scrutiny.²¹ There is not much support for this proposition, since even professionals can make mistakes. Whether the mistakes are inadvertant or intentional, the due process argument would state that they should be corrected, and that requires some sort of disclosure procedure.

Studies which have appeared regarding this topic shed light on some of these arguments, as they relate to empirical questions which can be tested. Studies of some aspects of the disclosure arguments suggest that the "street" sources of information do not seem to dry up where disclosure has been practiced, as in California. Neither has the delay in sentencing increased nor the quality of the information available to presentence investigators substantially changed as a result of disclosing the report.²² Furthermore, these arguments for one or the other position are not mutually exclusive. That is, it is possible for some of the worries about disclosure to be mitigated by limited disclosure or particular disclosure procedures which would reduce, if not eliminate, the problems. Since the question of disclosure is often based on broad policy preferences within the jurisdiction, the debate may not focus carefully on the real impact of the disclosure policy.

Disclosure of the Presentence Report to Third Parties

The second area involving the presentence report and privacy has not been addressed very closely in the literature. This is probably due to the fact that most observers feel that the access which others, especially public officials, are given is essential to carrying out the official duties assigned to them. The problems in this area focus on disclosure of the presentence report to the public, in open court, or to other governmental agencies, in writing. There are numerous uses of the information in the presentence report. Not only can officials use the report for penological purposes or classifying and treating the individual, but parole boards can

²¹Lehrich, *supra* note 13, at 238.

²²Bach, *The Defendant's Right to Access to Presentence Reports*, 4 CRIM. L. BULL. 160, 164 (1968); Higgins, *supra* note 17, at 30-32; Lorensen, *supra* note 5, at 163; *Proposed Amendment to the Federal Rules of Criminal Procedure for the United States District Courts*, 62 F.R.D. 271, 325 (1974)(Advisory Committee Note).

also use the information to assess whether the applicant should be paroled. Normally, the presentence report is forwarded to the incarcerating institution after a prison sentence is imposed. If the individual is placed on probation, the report becomes part of the materials which the probation officer might use in handling the individual's probation. The disclosure of the report in these instances is widespread, and few questions have been raised about the disclosure of the report to these officials.

There may be other agencies which might acquire and use the information even if it is not intended for such use. For example, unemployment compensation agencies or public employers may find the information quite valuable for purposes of each agency's decision regarding the individual. What kind of access such agencies have to the presentence report is problematic, and may depend on a number of discrete variables such as the judge's discretion or relationship with the head of the requesting agency.²³

Private parties could also find the information useful. While access of such persons can be more tightly controlled than other agency requests, it may be possible, if the report is presented in open court, or made part of the court record in a case, for the individual who is interested in the criminal to see what is contained in the presentence report. A prospective employer, a friend, or someone interested in tracing out the defendant's personal history would find the information quite useful, and it would be easy to obtain if the report were read in open court. Where the report is not part of the record, or is presented only for discussion in open court, access by private individuals is likely to be closely controlled by the judge and the court's clerical staff.

There is a growing expectation that the training of professionals (probation officers, case workers, and prison officials) and social science researchers require access to the materials in order that they may acquire insights on the subjects, and this increases the number of people with access to the records and information contained in the report.²⁴ The kind of control which is imposed or can be imposed on this expanding circle has not been considered and actual controls or restrictions have not been imposed in most jurisdictions. The reasons for this set of potential problems include the general lag between the identification of a problem and the adoption of any solution in judicial or legislative terms. Also the failure to recognize this access problem, and the general expectation that judicial control is sufficient to prevent any difficulties from arising, leads to less attention being focused on this situation. By default, in most states, judicial discretion is recognized as the major means of controlling

²³The federal courts are exempted from the Freedom of Information Act, 5 U.S.C. Para. 552(b)(7) (Supp. 1975). Thus, the judge may have discretion to release the presentence report without prior notice to the individual or approval from the subject of the report.

²⁴Barnett & Gronewald, *Confidentiality of the Presentence Report*, 26 FED. PROBATION 26, 27 (June 1962).

this kind of access, on an ad hoc basis.

The policies and practices of some state jurisdictions suggest that a number of solutions and controls can be applied to presentence report disclosure. These approaches indicate that nearly complete disclosure, in open court, can be found workable.²⁵ Authorities in California, where the report is made part of the public record, have found disclosure problems to be minimal, and the issue of privacy of the report has not been raised frequently. Other states require the report to be read in open court,²⁶ and this exposes the information to anyone present in the courtroom. Apparently this has not created great problems for the probation authorities, nor has the privacy of the individual criminal been jeopardized severely by this practice. At the other extreme, disclosure is left to the "sound discretion" of the trial judge.²⁷ While this policy may present more problems for the observer, it does not seem to inhibit the work of criminal courts in such jurisdictions.

Empirical Studies of Presentence Report Disclosure

There are several empirical studies of presentencing practices with regard to confidentiality. In an early study of confidentiality in the federal district courts, a questionnaire was sent to chief probation officers in the districts.²⁸ The results reflect the thinking of that time (1957). The report was generally available only to the sentencing judge in sixty-five districts, in thirty districts "other interested parties" could see the report, while in eleven, defense counsel had access, and in three others, federal investigative agencies could see the report.²⁹ These categories are not mutually exclusive, but the study suggests that the defendant was denied access directly in all districts, and defense counsel could see the report only in a minority of districts.

In 1963 Higgins submitted a questionnaire to federal district judges and found that 56 percent of the judges never disclosed the report, while 35 percent always did. The remaining 8 percent disclosed the presentence report on an occasional basis.³⁰ This would indicate that by the early 1960's the practice in the federal district courts had changed, allowing more disclosure than was the case in 1957. The Higgins study did not indicate the people to whom the report was disclosed, but it can be expected that in most cases this was the defendant.

A 1964 descriptive study of federal district court practices, in Maryland, suggested that the presentence report was usually shown to defense counsel and the lawyer was allowed to comment on the report

²⁵Bach, *supra* note 22, at 164; Lorenson, *supra* note 5, at 63.

²⁶OHIO REV. CODE §2947.06 (1975); VA. CODE §53-278.1 (Supp. 1975)(repealed 1975).

²⁷*Supra* note 4.

²⁸Gronewold, *Presentence Investigation Practices in the Federal Probation System*, 22 FED. PROBATION 27 (Sept., 1958).

²⁹*Id.* at 31.

³⁰Higgins, *supra* note 17, at 15.

before sentence was imposed.³¹ The prosecutor rarely sought to examine the report, and if such a request was made the judge determined whether to disclose, and to what extent.

There are a few studies of the practices in states, and those few have been sketchy and non-comparative.³² In a 1964 study in connection with Higgin's study of federal district courts, a study of New York indicated that 42 percent of the trial judges never divulged the report, 34 percent always disclosed it, and 23 percent did so occasionally.³³ While these statistics indicate that the blanket rule of disclosure was not followed as widely in New York as in the federal districts, the percent which disclosed the report at least some of the time was about the same as in the federal courts.

A study of Missouri practice in 1967, based on a questionnaire to the circuit judges in the state and interviews with probation officers, indicated that 97 percent of the judges did not feel that due process required disclosure.³⁴ However, some 78 percent did disclose the report on occasion, and another 39 percent always disclosed it.³⁵ This set of practices suggests that even by the mid-1960's several judges might have seen the need for disclosure, or felt that it would improve the sentencing process, or at least disclosure would reduce the chances of reversible error in the trial.³⁶

The most recent, if dated, study of practices in a state was a 1967 study of thirty trial judges in West Virginia.³⁷ The responses to a general letter of inquiry indicated that eleven always disclosed the report to defense counsel, and three more did it in most cases. None only disclosed the report rarely, or indicated that it was never disclosed. There appeared to

³¹Thomsen, *Confidentiality of the Presentence Report: A Middle Position*, 28 FED. PROBATION 8, 8-9 (Mar., 1964).

³²Higgins, *supra* note 17; Thomsen, *supra* note 31; Note, *Use of Presentence Investigation in Missouri*, 1964 WASH. U.L.Q. 396.

³³Higgins, *supra* note 17, at 17.

³⁴Note, *supra* note 32, at 405.

³⁵*Id.* at 405. The percentages reported do not total 100, and no explanation is provided for this discrepancy.

³⁶It was during this period that the pressure for broader disclosure practices appeared at the federal level, as well as in some other national circles. The Model Penal Code included provisions for compulsory disclosure in 1962. The American Bar Association study on sentencing practices strongly recommended disclosure of the presentence report. ABA SPECIAL COMMITTEE ON MINIMUM STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, *Standards Relating to Sentencing Alternatives and Procedures*, §4.4 (Approved Draft, 1968).

The Federal Rules of Criminal Procedure were silent on disclosure until the 1966 amendments which provided:

The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Rule 32(c).

Comparing this provision with the current federal rule, *infra* note 85, shows the gradual evolution of the federal provision to its present form.

³⁷Lorenson, *supra* note 5, at 161.

be a clear urban-rural distinction in the practices. Judges in urban jurisdictions made the reports available, while most rural judges did not.³⁸

This paucity of empirical studies and the fact that they are all rather dated make the need for a current and comprehensive study obvious. This study is intended to accomplish two primary objectives. First, to discover what policies are enunciated by jurisdictions to govern the disclosure of presentence reports. Clearly jurisdictions do not have the same statutes or case law regarding disclosure and some comparison of these would be informative. Second, the practices followed by judges and probation officers in these jurisdictions can be investigated to uncover variations between policies and practices.

Two sources of information were relied on for this study. The statutory materials regarding presentence reports were analyzed.³⁹ Second, a letter of inquiry was sent to a random sample of federal and state judges and probation officers.⁴⁰ While this will not permit any statistical analysis of the responses, some feeling for current practices and variations in practices can be derived from these materials.

PRESENTENCE DISCLOSURE POLICIES

The policies adopted by various United States jurisdictions encompass varying degrees of disclosure ranging from one extreme to the other. Some have very liberal provisions allowing the public access to the report,⁴¹ other states permit only the sentencing judge to examine the presentence report,⁴² while still others make no provision at all for disclosure.⁴³

The provisions of the federal rules relating to disclosure of the presentence report have recently gone through a substantial change, in the direction of disclosing the information in the report to defendant and defense counsel.⁴⁴ This change, made in 1975, does not go to the extreme of making complete disclosure mandatory. Rather, the judge still may exercise discretion in disclosure, but the policy preference of the current rule is to encourage disclosure of the report, or at least the information in the report, so that the defendant can rebut or comment on the information in

³⁸*Id.* at 162-63.

³⁹This portion of the study does not rely only on statutory material, but rather includes court rules of procedures. In some jurisdictions, the relevant provisions regarding the presentence report are contained in rules established by the court rather than by the legislature.

⁴⁰See Appendix A for a discussion of the questions and the response ratio of the various respondents.

⁴¹ARIZ. R. CRIM. P. 26.6; CAL. PENAL CODE §1203.01 (West Supp. 1978).

⁴²SO. DAK. COMP. LAWS ANN. §23-48-18 (Supp. 1967); TEX. CODE CRIM. PROC. ANN. §42.12 (Vernon Supp. 1977).

⁴³*E.g.*, ALA. CODE Tit. 13A, §13A-5-5 (1977); GA. CODE ANN. §27-2709 (1978); IDAHO CODE §20-220 (1948); N.M. STAT. ANN. §41-17-23 (1972); S.C. CODE §24-21-420 (1976); W. VA. CODE §62-12-7 (1977).

⁴⁴FED. R. CRIM. P. 32(c)(3).

the presentence report. The disclosure permitted encompasses only the defense and the prosecution.

The disclosure provisions contained in the statutes may be divided into five general categories. These categories are based on the groups of people who can see the presentence report. These include the (1) defendant and defense counsel, (2) prosecuting attorney, (3) correctional institutions, (4) public, and (5) others, such as law enforcement agencies, social service agencies, and researchers. It should be noted that a large number of the states have either no provisions for a presentence investigation or report at all,⁴⁵ or no provision regarding disclosure of the presentence investigation, even when providing for such an investigation.⁴⁶ Table 1 summarizes the various policies followed by states. Some states have provisions which are not amenable to such categorization (those marked with asterisks) and these are discussed separately later in this section. The categories in Table 1 are not mutually exclusive, but rather provide a check list of various provisions which are generally present in the statutes of some of the states.

Some state statutes contain more than just provisions for disclosure of the presentence report. Some allow the defense to rebut any evidence or material contained in the report,⁴⁷ others permit the defense to correct any incorrect information.⁴⁸ Other states permit either party to comment on the presentence report in order to provide the sentencing judge with all the mitigating and aggravating circumstances which might weigh in his decision.⁴⁹ Such procedures for handling the presentence report involve the sentencing process more than disclosure of the material in the report. However, the procedure for sentencing is closely connected with the disclosure of information about the individual criminal, and such sentencing hearings, which allow rebuttal, cross-examination, or comment on the report, clearly permit a certain, implicit disclosure of the information.

Table 1. Categorization of State Statutory Provisions Regarding Disclosure of Presentence Reports.

	Def.	Def.C.	Pros.	Inst.	Ct.Disc.	Public	Others	Noth- ing**	No Prov.**	Com- ments
	1	2	3	4	5	6	7	8	9	10
Alabama								x		
Alaska								x		
Arizona*	x	x	x	x		x				a
Arkansas	x	x		x						b

⁴⁵Alaska, Arkansas, Hawaii, Kansas, Kentucky, Mississippi, Tennessee, Utah and Washington.

⁴⁶See *supra* note 43.

⁴⁷IND. CODE §35-4.1-4-13 (1976), N.H. SUPER. CT. R. 99.

⁴⁸CONN. GEN. STAT. ANN. §54-109-a (West Supp. 1978); NEV. REV. STAT. §176.156 (1977); VT. R. CRIM. P. 32(c).

⁴⁹KY. R. CRIM. P. 11.04; OKLA. STAT. ANN. §982 (Supp. 1976).

California	x	x	x	x		x					
Colorado	x	x									c
Connecticut	x	x	x	x		o					
Delaware								x			
Dist. Columbia								x			
Florida	x	x	x	x	x	o	x				d
Georgia								x			e
Hawaii	x	x	x	x							f
Idaho								x			
Illinois		x	x	x							g
Indiana	x	x	x	x		o					h
Iowa	x		x	x	x						i
Kansas		x	x	x					x		
Kentucky											
Louisiana	x	x		x		o					j
Maine	x	x									
Maryland		x	x	x		o					
Massachusetts	x	x									
Michigan				x							
Minnesota		x	x								
Mississippi									x		
Missouri								x			
Montana				x	x	o					k
Nebraska	x	x		x	x	o					l
Nevada	x	x	x								m
New Hampshire	x	x	x								n
New Jersey				x							
New Mexico								x			
New York*	x	x	x		o						o
North Carolina	x	x	x			o					p
North Dakota*	x	x	x		x						q
Ohio*				x	x						r
Oklahoma	x	x	x								s
Oregon	x	x	x	x		o					
Pennsylvania		x	x			o	x				t
Rhode Island	x	x	x		x	o					u
South Carolina								x			
South Dakota				x	x	o					v
Tennessee									x		
Texas				x							
Utah	x	x	x								
Vermont		x	x								w
Virginia*		x				x					x
Washington	x	x	x								y
West Virginia								x			
Wisconsin	x	x	x			o					
Wyoming	x	x	x	x							

Notes:

x Permits or requires disclosure

o Specifically prohibits disclosure

* Marks a unique state which will be discussed in the text

** "Nothing" means that the statute contains no provision regarding

disclosure of the presentence report. "No Provision" indicates that the state has no provision for a presentence report at all.

- a If part of the report is not available to one party, the other party may not see it either. Judge may excise portions of the report and state the reasons for doing so.
- b Judge shall advise defendant or his counsel of factual content and conclusions.
- c Defendant is afforded an opportunity to make a statement and present information in mitigation of punishment.
- d Others with a legitimate professional interest may see the presentence report.
- e There is a presentence hearing in felony cases.
- f A copy is furnished to the defense for purposes of controverting "presentence diagnosis or psychiatric or other medical examination."
- g Presentence report must be disclosed to defense three days prior to sentencing. By implication the report, delivered in a sealed envelope to the sentencing judge, is not to be public.
- h Disclosure to the public is prohibited unless permitted by the court and the convicted person.
- i The presentence report becomes part of the court record, but it is sealed.
- j Judge shall advise defendant or defense counsel of factual content and conclusions of any presentence report.
- k If sources of information in presentence report are disclosed by judge, the defendant may be allowed to cross-examine these individuals.
- l Judge may allow others with a "proper interest" to inspect the presentence report.
- m Confidential sources of the report are not revealed. The judge shall advise defendant or defense counsel of factual content and conclusions of any presentence report.
- n Judge shall take necessary steps to afford a fair opportunity to controvert the factual content of the presentence report.
- o New York courts have discretion to except portions from disclosure. Such exceptions are subject to appellate review.
- p On defendant's motion, court may expunge presentence report from the court record.
- q Judge has discretion not to disclose "harmful" information to defendant. In lieu of disclosure, a summary of factual information can be provided.
- r Except in aggravated murder cases, the presentence report is confidential and need not be provided to defendant, defense counsel, or the prosecutor, unless the court, in its discretion, so orders.

- s Judge is required only to advise defendant or defense counsel and prosecutor of factual content and conclusions of the presentence report, and allow defendant to controvert if desired.
- t Persons with professional interest in the report may see it.
- u The judge must provide reasons for withholding any of the report from the defendant.
- v Judge may disclose to defendant, defense counsel, or prosecutor such portions of the presentence report as the court feels appropriate.
- w Court may refuse to disclose the report to defense, and only provide a summary.
- x Report is presented in open court, five days prior to sentencing, and is subject to cross-examination.
- y Judge has discretion to withhold information harmful to the defendant or other persons. In such cases, the judge provides a summary of the factual information.

*

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*

Disclosure to the Defendant and Defense Counsel

Several states have established policies which provide for disclosure to the defense, in an effort to meet the problems created by the considerations of fairness and accuracy.⁵⁰ Some of these provisions are subject to limitations, such as disclosing to the defendant only when he is not represented by counsel.⁵¹ Colorado,⁵² Illinois,⁵³ Minnesota,⁵⁴ New Hampshire,⁵⁵ Vermont⁵⁶ and Virginia⁵⁷ only allow the defense counsel to see the report.⁵⁸ Some states, such as Connecticut,⁵⁹ Iowa⁶⁰ and Maryland⁶¹ provide for disclosure only upon request. It has been held repeatedly that failure to disclose the report, absent a request to do so from the defense,

⁵⁰ARIZ. R. CRIM. P. 26.6; CAL. PENAL CODE §1203.01 (1978); CONN. GEN. STAT. ANN. §54-109a (West Supp. 1978); FLA. R. CRIM. P. 3.713; IND. CODE §35-4.1-4-13 (1976); LA. CODE CRIM. PRO. ANN. art. 875 (West Supp. 1978); ME. R. CRIM. P. 32(c); MASS. ANN. LAWS ch 279, §4A (Michie/Law Co-op 1978); NEV. REV. STAT. §176.156 (1978); N.Y. CRIM. PROC. LAW §390.50.2 (McKinney Supp. 1977); N.D. R. CRIM. P. 32(c); OHIO R. CRIM. P. 32.2(c); OKLA. STAT. ANN. tit. 22, §982 (West Supp. 1977); OR. REV. STAT. §137.079 (1978); R.I. R. CRIM. P. SUPER. CT. 32(c); WIS. STAT. ANN. §972.15 (West 1978); WYO. R. CRIM. P. 33(c).

⁵¹ARIZ. R. CRIM. P. 26.6; WIS. STAT. ANN. § 972.15 (West 1978).

⁵²COLO. R. CRIM. P. 32(a)(2).

⁵³ILL. ANN. STAT. ch. 38, § 1005-3-4(b)(2) (Smith-Hurd 1978).

⁵⁴MINN. R. CRIM. P. 27.02.

⁵⁵N.H. REV. STAT. ANN. § 504:2-a (Supp. 1977).

⁵⁶VT. R. CRIM. P. 32(c).

⁵⁷VA. CODE § 19.2-299 (1975).

⁵⁸The defendant without counsel would not be able to see or have any sort of access to the presentence report in these jurisdictions. Given the requirements for representation by counsel, this does not appear to be a very significant problem.

⁵⁹CONN. GEN. STAT. ANN. § 54-109-a (West Supp. 1978).

⁶⁰IOWA CODE ANN. § 901.4 (West Supp. 1978).

⁶¹MD. ANN. CODE art. 41, § 124.

does not constitute reversible error.⁶² Louisiana and Wyoming provide that either the defendant or the defense counsel may see the report, but that the confidential sources of information must be withheld.⁶³

It is not possible to pick a "typical" statute for illustrative purposes. However, one of the statutes relating to disclosure to the defendant which provides an exemplary picture of these provisions is Arizona's.⁶⁴ Its provisions illustrate a number of the features which can be covered by statute or rule relating to presentence report disclosure. First, the provisions allows disclosure to the parties in the case, both defense and prosecution, and sets forth procedures for disclosure in advance of the sentencing hearing so that comment on the information can be presented at the time or before the sentence is imposed.

Second, the sentencing judge is given discretion to exclude certain portions of the report from disclosure to the parties. However, the rule requires some kind of justification for excision, and channels non-disclosure into particular categories based on use or policy objectives—such as rehabilitation, protection of confidential sources, or impairment of ongoing criminal investigation. Subsection d (not reproduced here) provides that agency officials charged with disposition of the criminal after sentencing may have access to the report for purposes of carrying out their duties.

Lastly, subsection e involves a major provision regarding disclosure. It

⁶²See, e.g., *Gallo v. United States*, 461 F.2d 1008 (8th Cir. 1972).

⁶³LA. CODE CRIM. PRO. ANN. art. 875 (West Supp. 1979).

⁶⁴Rule 26.6 Disclosure of the presentence, diagnostic, and mental health reports

- a. Disclosure to the Parties. The court shall permit the prosecutor and defense counsel, or if he is without counsel, the defendant, to inspect all presentence, diagnostic and mental health reports. A portion of any report not made available to one party shall not be made available to any other.
- b. Date of Disclosure. Reports ordered under Rules 26.4 and 26.5 shall be made available to the parties at least 2 days prior to the date set for sentencing. Reports ordered under Rule 26.7(c) shall be made available no more than 2 days after delivery to the court and no less than 2 days prior to the presentencing hearing unless agreed otherwise by the parties.
- c. Excision. The court may excise from the copy of the presentence, diagnostic and mental health reports disclosed to the parties:
 - (1) Diagnostic opinions which may seriously disrupt a program of rehabilitation,
 - (2) The summary and recommendations of the probation officer,
 - (3) Sources of information obtained on a promise of confidentiality and,
 - (4) Information which would disrupt an existing police investigation.

When a portion of the presentence report is not disclosed, the court shall inform the parties and shall state on the record its reasons for making the excision.

- d. Disclosure After Sentencing.

* * *

- e. Public Disclosure of Presentence Diagnostic and Mental Health Reports. Reports prepared under Rules 26.4, 26.5 and 26.7(c) are matters of public record unless otherwise provided by the court.

makes the report a matter of public record *unless* the judge determines otherwise. There is not indication of what would justify removing the presentence report from the public record, and the policy is clearly in the direction of disclosure to the public. However, this provision, as can be seen from Table 1, is rare in terms of state policies.

Disclosure to Prosecuting Attorney

As illustrated in the Arizona statute discussed above, there is often a provision for disclosure of the presentence report to the prosecution as well as the defense. This is justified largely on procedural grounds. If the presentence report is disclosed to the defense in order to provide an opportunity to correct misinformation or present mitigating circumstances, the adversary process would dictate that the prosecutor be allowed to see the report in order to present countervailing information. This would help insure that neither party possesses an advantage over the other under the adversary process.⁶⁵ However, this argument is based on some sort of sentencing procedure, in which both sides must see the report in order to contribute to the proceeding in appropriate fashion. No such justification would hold where there is no mitigating/aggravating hearing provided, or no procedure for rebuttal evidence or cross-examination of the informants before sentencing.

Twenty-four states provide by statute for disclosure to the prosecuting attorney.⁶⁶ Iowa and Maryland provide for disclosure of the presentence report only upon request of the prosecutor.⁶⁷ However, the remainder of these states simply give the prosecution access to the report. It is interesting to note, however, that of these states, only eight specifically provide for some kind of mitigation and aggravation proceeding by statute. Thus, the procedural justification for disclosure to the prosecutor in order to balance the sentencing process does not seem to be borne out by the empirical evidence. Many trial judges may provide some kind of hearing at sentencing even though it is not required by statute. In such a situation, disclosure to the prosecutor would be appropriate.

It is also possible that the presentence report would be valuable to the prosecution if the judge receives a sentence recommendation from the prosecutor. Thus, the prosecutor's recommendation could be based on the report, as well as the evidence which is presented at trial. In most jurisdictions such a sentence recommendation is either used in plea bargained cases, where the presentence report is superfluous, or is requested by the judge on a discretionary basis. It appears that disclosure to the prosecution is closely connected to either a sentence recommendation procedure, or a sentencing hearing in which the adversary process is built into the sentence determination.

⁶⁵Fuller, *Adversary System*, in TALKS ON AMERICAN LAW 30 (H. Berman ed. 1961).

⁶⁶See Table 1 in text.

⁶⁷IOWA CODE ANN. § 789A.5 (West Supp. 1977); MD. ANN. CODE art. 41, § 124 (1978).

It is likely that the provisions for disclosure to the prosecution are also based on the fact that the prosecution is intimately involved in all stages of the criminal process, and once the sentencing stage is reached, it does not seem appropriate to exclude the prosecution. In terms of the privacy issue, however, it would seem unjustified to disclose the report to the prosecution unless the defendant permitted it, or unless there was some procedure in which the prosecution could make a contribution to the sentencing decision if the information in the report were available to him.

Disclosure to Other Public Agencies

Disclosure of the presentence report to public agencies is based on a different set of justifications than for the prosecutor. When a person is sentenced, the sentence is usually carried out by some public agency, whether penal institution or probation officer. As a result, the information in the presentence report might be very useful to these enforcement agencies in performing their own functions—supervision, rehabilitation, or correction. The report contains information which the penal institution may need in order to shape the incarceration to fit the rehabilitative expectations and consequences to the criminal, or to classify the criminal. If the criminal is released on probation, the report will provide basic information and added understanding of the client to the probation officer assigned to the case. Thus, the appropriate relationship between agency and convicted criminal may require that the presentence report be provided to the agency.

Some states (11) provide specifically for a copy of the presentence report to be sent to the correctional or rehabilitative institution to which the criminal is committed.⁶⁸ This low number is interesting since in practice undoubtedly more than this 20% of the states release the report to institutions. It is likely that informal practice is the rule in these situations, but the low percentage of states which specifically provide for this disclosure suggests it is either not considered important enough to specify by legislation or not a practice which has caused legal problems requiring definitive policy resolution by the legislature.

Disclosure to the Public

Disclosure of the presentence report to the public has received much less attention than other disclosure topics, even though it may be the central issue in terms of individual privacy today. The contents of the report, focusing on the individual criminal and evaluation of this individual, in-

⁶⁸ARIZ. R. CRIM. P. 26.6; CAL. PENAL CODE § 1203.01 (West Supp. 1968); ILL. ANN. STAT. ch. 38, § 1005-3-4 (Smith-Hurd 1973); IND. CODE § 35-8-1A-15 (Burns 1975); IOWA CODE ANN. § 789A.5 (West Supp. 1977); LA. CODE CRIM. P. art. 875 (West 1967); MD. ANN. CODE art. 41, § 124 (1978); MICH. COMP. LAWS ANN. § 771.14 (1968); MONT. REV. CODES ANN. § 95-2203 (1969); N.Y. CRIM. PROC. LAW, art. 390 (1977); TEX. CRIM. PRO. CODE ANN. tit. 5, § 42.12 (Vernon 1966).

volve a good deal of intimate psychological information which others, outsiders, might find of interest, even though the criminal may be injured by such use. Some states do have statutory provisions dealing with disclosure of the report to the public. These range from the extreme of prohibiting disclosure, to the other end of the spectrum, making the report part of the public record, which can be inspected by anyone who wishes to. The Virginia⁶⁹ and California⁷⁰ statutes provide for the presentence report to become part of the court record. In Virginia, the presentence report is read in open court and the defense is accorded the opportunity to rebut the information contained in it. In California, the report is filed with the clerk of the court and is included in the court record of the case.⁷¹ In Arizona, as outlined above, the court is given the discretion to make the report confidential, but the rule is to make the report part of the public record, and there are no explicit guidelines for determining under what circumstances the report should be kept confidential by the court.⁷²

On the other extreme, some states provide explicitly that the presentence report will not be disclosed to the public or made part of the public record.⁷³ Two states do provide that the sealed court record is available for inspection by an appellate court in reviewing the case,⁷⁴ the gist of these provisions is non-disclosure of the presentence report to the public. There are no explicit justifications for this policy contained in the statutes, however, it is likely that some consideration of the criminal's privacy and the absence of any justification for public disclosure of the report support this general policy orientation toward the presentence report.

A few other states have provisions that the presentence report is not a part of the record, but the report can be disclosed at the discretion of the court.⁷⁵ There is no explication of the parameters of this discretion, but it can be expected that the policy against public disclosure would make the exercise of such discretion rare on the part of most trial judges. Interestingly, the Indiana provision requires that public disclosure can occur only after both the court *and* the defendant consent to such disclosure.⁷⁶

⁶⁹VA. CODE § 19.2-299 (1975).

⁷⁰CAL. PENAL CODE § 1203.01 (West Supp. 1968).

⁷¹*Id.* at § 1203(a) (West Supp. 1977).

⁷²ARIZ. R. CRIM. P. 26.6e.

⁷³*E.g.*, FLA. R. CRIM. P. 3.712; IND. CODE §35-4.1-4-14 (Burns 1975); MD. ANN. CODE art. 41, §124; N.Y. CRIM. PROC. LAW §390.50 (McKinney Supp. 1977); PA.R. CRIM. P. 1404 (Purdon 1978); WIS. STAT. ANN. §972.15 (West 1971).

⁷⁴IOWA CODE ANN. §901.4 (West Supp. 1978); MONT. REV. CODES ANN. §95-2205 (1969).

⁷⁵IND. CODE §35-4.1-4-14 (Burns 1975); MD. ANN. CODE art. 41, §124; N.Y. CRIM. PROC. LAW §390.20 (McKinney Supp. 1977); WIS. STAT. ANN. §972.15 (West 1971).

⁷⁶IND. CODE §35-4.1-4-14 (1976).

Disclosure to Others

Florida and Pennsylvania allow others, not parties to the case, to have access to the report.⁷⁷ These provisions allow law enforcement officials, researchers, and others with a "legitimate professional interest" (as determined by the trial judge) to have access. Both of these states specify that the report is *not* available to the public, so the provision for access by others is limited to specific sets of individuals which can be screened by the judge when necessary.

Judicial Discretion Relating to Disclosure

Until recently, many state statutes and cases provided that the disclosure of the presentence report was up to the discretion of the trial judge. Currently, only a few states authorize disclosure based on the judge's discretion.⁷⁸ With varying degrees of specificity, the judge must determine whether a portion or all of the report will be disclosed to the defendant or other individual requesting access. Some states require that the judge state the reasons for withholding information, within the exercise of his discretion.⁷⁹

The judge was given discretion as to disclosure because many felt that he can best determine if disclosure would have a negative effect on the defendant and his rehabilitation. Such discretion is exercised on a case-by-case basis since each case involves a unique set of circumstances. Some states provide for a summary, for excerpts, or for the factual information contained in the report to be made available if the report itself is held as confidential.⁸⁰ Arizona,⁸¹ Oregon⁸² and Rhode Island⁸³ require the court to state the reasons for withholding information in the presentence report from the defense. Despite the fact that even the old (pre-1966) federal rule tied disclosure to the discretion of the judge, the recent decrease in such flexibility suggests either a reluctance to lodge control of the report entirely in the discretion of the judge, or explicit policy attention to the question with decreasing reliance on discretion.

These provisions and the decrease in reliance on discretion probably reflect an effort to limit or eliminate the possibility that the sentencing judge will abuse his discretion in the course of sentencing, by means of controlling the presentence report. Particularly, it appears that while the judge may be the only individual able to make the kinds of determina-

⁷⁷FLA. R. CRIM. P. 3.712; PA. R. CRIM. P. 1404 (Purdon 1978).

⁷⁸FLA. R. CRIM. P. 3.712; IOWA CODE ANN. §901.4; MONT. REV. CODES ANN. §95-2205; N.D. R. CRIM. P. 32(c); OHIO R. CRIM. P. 32.2(c); OR. REV. STAT. §137.079; R.I. R. CRIM. P. SUPER. CT. 32(c).

⁷⁹ARIZ. R. CRIM. P. 26.2; OR. REV. STAT. §137.079 (1977).

⁸⁰IND. CODE §35-4.1-4-13 (Burns 1975); ME. R. CRIM. P. 32(c); NEV. REV. STAT. §176.156 (1977); N.D. R. CRIM. P. 32(c); OKLA. STAT. ANN. tit. 22, §982 (West Supp. 1977).

⁸¹ARIZ. R. CRIM. P. 26.6.

⁸²OR. REV. STAT. §137.079 (1977).

⁸³R.I. R. CRIM. P. 32(c) (1976).

tions which some states wish made regarding presentence report disclosure, there is a recognition that some limits or guidelines might be appropriately imposed on the judge in this regard. The growth in statutory provisions regarding disclosure and the decrease in judicial discretion are probably also the result of recent attention to the problem of presentence report privacy. A number of states, in responding to this question, have limited (or eliminated) judicial discretion and specified disclosure provisions.⁸⁴

Federal Rule 32(c)

In July of 1975 the Federal Rules of Criminal Procedure were substantially amended regarding disclosure of the presentence report. These changes focus much more directly on the need for the defense to know the contents of the report than did the earlier, 1966 rule. However, the recent amendments do not provide the extreme of public disclosure of the report. In fact, the 1975 rule still provides a good deal of judicial discretion regarding the actual information disclosed, and the actual circumstances under which disclosure can take place.⁸⁵

⁸⁴Note, *Recent Developments in the Confidentiality of Presentence Reports*, 40 ALB. L. REV. 619 (1976) argues that the disclosure issue, even with respect to defendants, is not closed, but rather still open to debate and contention. The point made in the text here is that there has been movement toward more disclosure and that is likely to be the direction in the near future.

⁸⁵FED. R. CRIM. P. 32(c) provides, in part as follows:
Rule 32(c) Presentence Investigation . . .

(3) *Disclosure.*

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources, or information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c) (3) (A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs. . . .

The provisions in the 1975 rule suggest a policy preference in the direction of making disclosure to the defense more frequent and regular. However, the rule also allows the judge a substantial amount of discretion on what to disclose, and what to excise from the report. How federal district judges exercise this discretion is problematic and will be explored in the next section of this report. When the judge does excise information he must disclose the essence of that information to the parties under rule 32(c)(3)(B), and it is at least possible that this disclosure could be made in open court or on the record. The last sentence of this subsection provides that the statement by the judge can be made to the parties in camera, but apparently that depends on the judge's discretion.

Subsection (D) of the rule also specifies that the copies of the report which are provided to the parties will be returned to the probation officer right after sentence has been imposed. This feature is not unique to the federal rule,⁸⁶ but the remainder of this provision allows the court to direct otherwise. Again the actual practice of judges will depend on various considerations, and it is unlikely that many judges allow these reports to become part of the public domain. However, it is at least possible that control over this information is not very tight. It depends on the judge, and the policy is to require control of copies of the report, but access is not prohibited by explicit policy statements in the rule.

Rule 32(c) is typical of presentence disclosure provisions in many ways. It is a current reflection of the competing considerations which have been discussed above, and it provides for a compromise position between complete control and non-disclosure of the information on the one hand, and the need for the defense to see the information and contest or correct it on the other. It appears that the disclosure of the report is limited to a small circle of participants—defense and prosecution, and probation officials—but the possibility of others (including the public) gaining access is not totally removed. Most situations can be and probably are carefully controlled by the trial judge, and access by other persons to the information in the report is probably very limited, at most. However, the possibility is present that others could see the report or learn the information contained in the report. In common practice the possibility of such disclosure is undoubtedly very low.

Specific Provisions

Some of the states, as indicated in Table 1, have unique provisions for disclosure of the presentence report. These states do illustrate some extreme or unique policy approaches to the problems of disclosure. That is not to say that these provisions are incorrect or unfair. Rather these indicate policies which are farthest from the norm followed in the largest number of states. It is interesting to note that the current provisions

⁸⁶North Dakota requires close control of the copies of the report which are presented to the parties for informational purposes. N.D. R. CRIM. P. 32(c)(iv)(1976).

analyzed in Table 1 generally have been framed and implemented in the past decade. It is likely that the next decade will produce even more changes and new approaches to the problems of presentence report disclosure. Some of the policy solutions adopted by these few, unique states, may well gain visibility and prove to be among the more viable in the years to come.

In Virginia, a copy of the presentence report is made available to the defense counsel, for his *permanent use*, at least five days prior to sentencing.⁸⁷ The report is then read in open court and the defense is given the opportunity to cross-examine the investigating officer and present any additional information or facts bearing on the case.⁸⁸ There is no explicit rationale for giving defense counsel a copy of the report for his permanent files. This is contrary to the provisions or practices in other jurisdictions which do not allow the defense even to make a copy of the report, but rather allow only the opportunity to read it and take notes on it in the clerk's or probation office.⁸⁹ Virginia's provisions do not provide for disclosure to the prosecuting attorney, although making the report part of the record, and reading it in open court, would certainly acquaint everyone present, including the prosecutor, with the report.

North Dakota, Arizona and Ohio provide that if the information is disclosed to one party, it must also be disclosed to the other.⁹⁰ The first two of these states require that both parties must be treated identically with regard to disclosure. This would suggest some consideration of the adversary nature of the sentencing process, by explicitly indicating that treatment must be equal. This may be contrary to the intention of the sentence as "helping" the criminal, and thus all the participants are supposedly on the same side, seeking the same objective at the point of imposing sentence.

In New York, the provision for disclosure includes one variation which is worth attention. The statute allows the trial judge to excise portions of the report and the wording is very similar to the federal rule. However, the New York provision allows the defense or the prosecution to appeal the trial judge's exception of information from disclosure.⁹¹ This is somewhat unique in light of the fact that this gives the appellate court the opportunity to second guess the trial judge's exclusion of material. It may also permit the appellant on such a question (this might often be the defendant) the opportunity to examine the presentence report for purposes of appeal. Actual practice in this regard is not clear.

⁸⁷VA. CODE §19.2-299 (1975).

⁸⁸*Id.*

⁸⁹FED. R. CRIM. P. 32(c)(3)(D).

⁹⁰ARIZ. R. CRIM. P. 26.6a; N.D. R. CRIM. P. 32(c)(3)(iii); OHIO R. CRIM. P. 32.2(B)(2).

⁹¹N.Y. CRIM. PROC. LAW §390.50.2 (Supp. 1977).

Specific Procedures for Disclosure

As is apparent from the preceding discussion, there are several different parties and institutions to whom the presentence report may be disclosed. Some of the disclosure provisions set forth very specific procedures for disclosure. These deal with time requirements, summaries, or anonymity of sources of information.

There are five states that have imposed time restrictions on the disclosure to the parties. The specific requirements vary from five days prior to sentencing to twenty four hours before sentence is imposed. These depend on provisions for comments or rebuttal of the report. Arizona⁹² requires that the presentence report be revealed two days before sentencing. Illinois⁹³ requires three days, and Virginia⁹⁴ requires disclosure five days before sentencing. Virginia also has provision for rebuttal evidence, rather than just allowing comment on the information in the report. The Connecticut statute⁹⁵ requires disclosure only twenty-four hours in advance of sentencing, and the Wisconsin provisions⁹⁶ only require that the report must be revealed prior to sentencing, outlining no specific time span. The case law on what is a reasonable time before sentencing for disclosure is rather mixed.⁹⁷

Several states require that the sources of information always be confidential. Iowa,⁹⁸ Louisiana,⁹⁹ Montana¹⁰⁰ and Nevada¹⁰¹ all make such a requirement. Other states provide that the judge may exclude the source of information.¹⁰² This provision is usually explained in terms of protecting the sources of information from danger, or protecting the defendant from information, or evaluation of the person's mental state which would reduce the likelihood of successfully rehabilitating the criminal. A number of states, while not explicitly providing for this excision of sources automatically, provide for the sentencing judge to exclude the sources of information from the report on the basis of his discretionary judgment about the injury which disclosure of sources would cause.

Georgia¹⁰³ makes specific provision for sentencing hearings in felony cases. A similar one in Idaho,¹⁰⁴ also provides for such a hearing in felony cases.

⁹²ARIZ. R. CRIM. P. 26.6(b).

⁹³ILL. ANN. STAT. ch. 38, §1005-3-4 (1973).

⁹⁴VA. CODE §19.2-299 (1975).

⁹⁵CONN. GEN. STAT. ANN. §54-109a (West Supp. 1978).

⁹⁶WIS. STAT. ANN., §972.15 (West Supp. 1971).

⁹⁷Guglielmo v. State, 318 So. 2d 526 (Fla. Dist. Ct. App. 1975).

⁹⁸IOWA CODE ANN. §789A.5 (West Supp. 1978).

⁹⁹LA. CODE CRIM. PRO. ANN. art. 877 (West 1967).

¹⁰⁰MONT. REV. CODES ANN. §95-2205 (1969).

¹⁰¹NEV. REV. STAT. §176.156 (1973).

¹⁰²ME. R. CRIM. P. 32(c); WIS. STAT. ANN. §972.15(3) (1971).

¹⁰³GA. CODE ANN. §27-2503 (1978).

¹⁰⁴IDAHO CODE §19-2515(c) (Supp. 1978) provides for such a hearing where the death penalty may be imposed.

PRESENTENCE REPORT DISCLOSURE PRACTICES:
THE FEDERAL COURTS

The mail questionnaires analyzed here were designed to expose the actual practices, and procedures followed by various officials. Thus, to the degree that they disclose variations from statutory or rule provisions, it might be possible to appraise the differences between policy and practice.¹⁰⁵

Federal District Judges

The most useful set of responses to the questionnaires was those of federal district judges because the response rate was relatively high and because the responses illustrate a good deal of variation in the practices with regard to presentence report disclosure. Despite the fact that all federal judges are governed by the same rule, they indicated a variety of actual practices.

There is variation among federal district judges about what the rule requires regarding disclosure. Some suggested that the rule *required* disclosure of the report to the defendant, or to his counsel. Others indicated that their practices were based on what they considered to be fair, or required by the Bill of Rights. Still others seemed to mix the rule and fairness as the basis for their practices. Rule 32(c)(3)(A) indicates that the judge shall, "upon request," permit the defendant, or his counsel, to read the presentence report, exclusive of any sentence recommendation. Only a small portion of the judges who responded to the questionnaire indicated that they waited for a request before disclosing the report. The large majority apparently disclosed the presentence report regularly and automatically, either by formal notice to the defendant or his counsel, or by informal announcement that the report was available for inspection. Most of the responding judges indicated that the inspection of the report by the defense was allowed in all cases, and that the rule required this.

Some judges made the presentence report available to the defense counsel, while not allowing the defendant to see the report. "I do not allow the defendant to see the report, although it is possible that his counsel may tell him about it." "The defendant is never given access to the report. It is assumed that his attorney advises him of the contents of the report." The only explicated reason for not allowing the defendant to examine the report was that "very frequently, there are items relating to the defendant's mental condition which might be of detriment for him to know." Implicitly, the rule allows either the defendant *or* his counsel "if

¹⁰⁵This section and the following one are based on written responses to a set of questions posed to samples of officials. In the discussion which follows some quantitative terms, such as "most" or "few" are used. These refer only to proportions of those responding to the questionnaire and should not be interpreted to apply to all judges or probation officers.

he is so represented" to examine the report. The wording of the rule would thus provide support for the practice that only counsel need be allowed to see the presentence report.

Regardless of the justification for not disclosing the presentence report to the defendant, a substantial portion of the district court judges did indicate that both counsel and the defendant were allowed to see the report.

In all instances the defense counsel, the defendant and the U.S.

Attorney's Office are each furnished a copy of the report. . . .

The defendant and defense counsel *always* see the presentence report, preferably prior to the time of sentencing. (emphasis in the original)

. . . both the defendant and his counsel in all cases see the court's original copy.

This difference between disclosing to counsel and to the defendant may be a minor matter if it can be assumed that counsel will always confer with the defendant about the report. However, some judges indicated that their disclosure to defense counsel might include some confidential material—clearly marked as such—which the lawyer was not to disclose to the defendant. How reliable such restrictions are is questionable and if attorneys are assumed both to discuss the report with defendant, and not disclose some information to the defendant, the attorney is placed in a difficult position, and may very well be open to attacks from both sides, for not discussing and for disclosing. Although no responding judge indicated that the attorney was expected to do both, discuss the presentence report and not disclose some information, the possibility of this is present. The solution to the problem is certainly not clear.

The assumption in disclosing to the defense counsel is that the lawyer can bring any discrepancies or problems to the court's attention so that the presentence report will contain no factual errors. The attorney's task here may be quite difficult unless he knows the defendant well, or discusses the contents of the report at some length with the defendant, so that factual errors can be brought to the attorney's attention. The judges did not indicate how they expected the errors to be spotted or corrected, other than that the defense attorney would do this. In some instances the judge indicated that the report was disclosed to the attorney prior to the sentencing hearing, and the defendant was allowed to examine a copy at the sentencing hearing. It is not unlikely that this process, followed by a few judges, could create substantial problems since the defendant would not be able to call the attorney's attention to factual errors, until minutes before sentence was imposed. If the judge were so inclined he could postpone sentencing until the discrepancies were clarified, but how effective counsel would be in raising last-minute problems is questionable. One judge specifically stated that the report is not given to the defendant, as defense counsel can ask him about anything in the report that he wishes to. Obviously, the lawyer is presumed to discuss the matters con-

tained in the report with the defendant, and get clarifications on facts where the counsel feels it is necessary. However, if the facts, on their face, appear correct to counsel, he may never raise a question about them with the defendant, and thus never be alerted to some potential error, which only the defendant would be able to spot.

The disclosure *process* varies a good deal among the responding judges, and the range of practices is surprising. The standard practice appears to involve the defense counsel examining the presentence report in the probation office or the judge's chambers. There are variations from this, ranging up to sending a copy of the report to defense counsel in the mail, subject to his returning the report at the time of sentencing.

"Defense counsel receives copy by mail and returns same (in the Court) following sentence. This honor system has worked effectively.¹⁰⁶ "The entire report is sent to counsel for both sides." This extreme practice is not followed by many of the judges, and most seem to allow examination of the report under some sort of supervision, either by the probation office or the judge (or, in one case, the judge's secretary).

In most cases the sentence recommendations of the probation officer making the report are not disclosed to the defense. This is specified in the rule. In addition, the kind of notes which can be made of the report vary. Some judges allow the defense to take notes, but not make a copy, even by hand, of the entire report. One judge, the extreme, does not even permit the defense counsel to take notes on the report. "[C]ounsel is simply handed the part of the report which he may see. He has to read it in my probation office, but not in the presence of a probation officer, or in open court. He is not allowed to make notes from the report."

Judges, in a large number of instances, are very careful about establishing, on the trial record, the fact that the presentence report has been seen, and inspected, by the defense counsel, and in some cases by the defendant as well. This seems to protect the judge from possible post-conviction appeals challenging the sentencing procedure. This procedure is also often connected to the process of establishing that the facts contained in the report are correct. "[T]he record must affirmatively reflect that the defendant has received and reviewed the report. Since some defendants are illiterate, I also inquire of defense counsel if he has been over the report with the defendant in every detail." These procedures may primarily focus on ascertaining that the contents of the report are correct, and that there are no errors of fact which might influence the sentence imposed. In several instances, the judge indicated that if the defendant or defense counsel answered his question negatively—they had not read the report—time was afforded immediately, in court, for inspection and reading of the report, before the sentencing process continued.

¹⁰⁶Throughout the remainder of this study, parentheses () in a quotation were supplied by the respondent; brackets [] are additions by the author to clarify the quotation.

Also, if the defense indicated that there were some errors of facts in the report during this preliminary examination of the report, the matter would be clarified (and corrected if necessary) at once, or the hearing would be postponed until the errors could be checked.

The judges who indicated they established that the defense had read the report, did not indicate that the reason for this practice was merely to protect the judge from reversal on appeal. Most of them indicated it was fair to make certain the defense had seen the report, or that it was part of the process of insuring that the report was correct. This would suggest that the procedure of insuring that the defense had seen the report prior to sentencing is designed to insure that the report is correct, as a protection to the judge for purposes of sentencing, and as a protection to the defendant who is being sentenced.

Most of the judges specified that they do excise certain portions of the report from defense examination. In particular, nearly all judges indicated that the sentence recommendations of the probation officer who prepared the report are not given to the defense. This is usually done quite easily by placing the sentence recommendations and other remarks of the probation office on a separate sheet of the report, and not including that sheet in the copy which the defense is allowed to examine.¹⁰⁷ This practice is clearly mandated by the provisions of rule 32(c)(A). Some judges however, disclose everything else contained in the report. The judges indicated the feeling that the defendant (or the defense counsel) should know everything which is being presented to the sentencing judge. To achieve this objective, the judges emphasized that the entire report had to be presented to the defense. While it is clear that the judges who responded this way knew of their authority to excise portions of the report which would be detrimental to the defendant, they were prepared to err in favor of more rather than less disclosure to the defense, out of a sense of fairness and due process.

Other judges seemed to be more in favor of carefully screening the report before disclosing it to the defense. In some instances the screening might be done by the defense counsel, but most often the judge indicated the kinds of things which he would not disclose to the defense at all. "Such excisions usually involve diagnostic information or data gathered from family members whose revelation might disrupt a family relationship. I have found defense counsel uniformly understanding and cooperative."

In most of the responses, it appears that the judge relied on the probation officer preparing the report or the probation office to call this damaging material to the judge's attention. This agency might be able to make this determination more easily than the judge can, by his own examination of the report. However, it also leaves the decision on what to

¹⁰⁷The federal long form contains a last page on which these matters are supplied by the probation office, and thus they can easily be removed from the copy shown to the defense.

disclose to the agency rather than the judge. "My practice is to have the Probation Department bring to my attention any such material which should be withheld. Absent an alert, the entire report is made available to the defendant, . . . [and] to the government." How limiting the probation office is with regard to disclosure of some materials undoubtedly depends on the judge and his level of deference to that agency. Most judges who rely on the office to call such material to their attention, probably screen the information only slightly. If the judge allows the probation office to include confidential material in a section of the report, he may simply accept this and automatically release the remainder of the report to the defense. In most instances the judge probably makes the final determination after consultation with the probation officer.

It would appear from the comments in a number of responses, that the need to excise materials from the report is rare. Some judges indicated that they had never had a request to do so, and thus, always disclosed the entire report. Others suggested that they had removed some portions of some reports in prior cases, but that it was seldom necessary.

Thus, it would appear that even though the excision of material from the presentence report is left to the judge's discretion, which is often exercised, in fact, by the probation office rather than the judge, the general rule is that disclosure is not frequently limited. Given the fact that this discretionary control is considered quite important for purposes of the rehabilitative ideal or the confidentiality of sources for probation office purposes, it is rarely practiced in fact. Disclosure of the presentence report to the defense is usually complete, except for the portion which the rules require to be withheld (the sentence recommendation of the probation officer).

From several comments made by judges, it is clear that the disclosure of the presentence report to the defense can be circumvented, to a degree, by means of oral discussions between the judge and the probation office. Thus, while the report is seen by the defense, what is communicated orally to the judge about the defendant and the sentence may involve a good deal of information, which is unknown to the defense and cannot be corrected or rebutted.

I have always conferred with the Probation Officer who has drafted the presentence report before I sentence any defendant. Prior to adopting the policy of revealing the presentence report to the defendant and his attorney, the Probation Officer included in the report deductions made from the facts revealed in his investigation and his recommendations. Now the presentence report tends to be more factual and the officer's deductions and recommendations are largely confined to my verbal conference with the Officer.

. . . I study the report thoroughly as well as have a conference with the U.S. Probation Office in most cases.

How significant these oral conferences might be depends on the judge

and his relationship with the probation office. However, it does exclude the defendant and defense counsel from some potentially significant aspects of sentencing. If the only items discussed between the judge and the probation officer are the sentence recommendation, and items which could be defined within the scope of confidentiality, then the defense has no right, under the rule, to know what transpired during the discussion. However, if some factual information was given the judge, which is not written into the report, it seems clear that the defense should be given some opportunity to know about it, and correct it or rebut it if necessary.

Federal district judges indicated that they make a presentence report available to the prosecutor (U.S. Attorney) when the report is presented to the defense. This is required by the rule¹⁰⁸ and the justification for this disclosure is largely the rule itself. However, several responding judges indicated that they thought such disclosure was only fair, in order to balance the position of the defense with regard to the sentencing process. This justification, based on the adversary system, seems to have merit where there is some sentencing procedure which involves a hearing or an adversarial contest between the parties over the sentence imposed. This hearing clearly is provided in the federal district courts, although not in all state sentencing procedures.

Nearly all of the judges indicated that the presentence report was "disclosed" to the U.S. Probation Office. This disclosure actually involves the preparation of the report by the probation officer, and whatever agency supervision or examination of the report is present. In fact, a number of judges indicated that the probation office actually has control over the report and acts at the judge's orders. The office retains the report and supervises access to it. In most cases, the report, after sentencing, is returned to the Probation Office, for its records (and a copy is also forwarded to any incarcerating institution or probation office involved with the criminal). While the disclosure of the report by the probation office does involve a bureaucratic structure, it seems that the actual policies regarding disclosure and the procedure followed for disclosure are established by the judge of the district, and the agency carries out the judge's wishes.

Beyond disclosure to the prosecutor and the probation office, it appears that federal judges do not make it a practice to permit examination of the presentence report. There may be exceptions, noted by a few judges, but generally they indicated that the report is not a matter of public concern or interest, and they generally take steps in the course of the sentencing proceedings to prevent public disclosure or inspection of the report. Most of the responding judges indicated that they were quite sensitive about the information contained in the report and that this was a major consideration in not making the report public, or allowing public scrutiny. Whether the judge articulated a precise basis for this control or

¹⁰⁸FED. R. CRIM. P. 32(c)(3)(C).

not, most judges felt that the contents made the report sensitive and they sought to protect the defendant by not disclosing it.

Some judges indicated that there might be circumstances under which the disclosure of the report to third parties would be appropriate. One judge indicated that while disclosure could be made to other officials for purposes of dealing with the case, he would never release the report to law enforcement officials, because that background information was none of their business. Others were more positive about allowing third-party inspection, but in all cases their statements were guarded. One judge would allow disclosure to others only after the defendant had provided written permission for the release.

I allow . . . occasionally an interested party (such as an employer) to review the report prior to sentencing. I would allow a third party to review the report only with the consent of the defendant. After sentencing no one is permitted to review the report by my office. Because of the confidential nature of the report it should never be made public information. . . . After sentencing the only other person that should be permitted to review the report are [sic] persons who are authorized by statute, persons authorized by court order entered for good cause shown, after notice to the defendant and opportunity to be heard, and representative [sic] of other agencies in the field of corrections (not law enforcement) which are on an exchange basis with our probation office.

It is unclear whether this judge thinks the listed categories of people are authorized to see the report by statute, or not, but he does not specify any statute or any group explicitly which has statutory authority to examine the presentence report.

The confidential nature of the report may be modified by the position of one judge who indicated that "[t]he report is considered to be a confidential document, not available to others without the express consent and approval of the defendant and/or the Probation Office." This would suggest that if the defendant were to ask for the release of the presentence report to a third party the judge would permit it. Furthermore, however, it appears that the judge would allow the Probation Office to distribute the report, on the basis of whatever factors that agency thought appropriate. This creates two very diverse threads in the control of the report. On the one hand, the defendant is given control over the information because it concerns him and because it is often damaging to him, or at least private. On the other hand, the probation office is given the authority to release the information if the agency thinks it is appropriate.

Another judge indicated that there were specific kinds of officials who enjoy access to the report. "Rarely, if the defendant is undergoing psychiatric examination or treatment, I will make the presentence report available to the psychiatrist. In the event of these disclosures, I will usually make both the report and the probation officer's recommenda-

tions available." However, this disclosure could probably be classified as disclosure of the report to another agency, given the authority over the defendant to rehabilitate him, and thus this would not be disclosure to the public.

The judges who seek to control the disclosure process indicated that among the reasons for such control was the need to anticipate post-conviction appeals from the sentence. It can be suggested that the control of presentence reports might be viewed, not only from the perspective of privacy, but also in terms of the operation of the judicial system. To the degree that the sentence and the sentencing process come under appellate scrutiny, it may be necessary to disclose the report—possibly to the public. Currently most appellate courts allow the defendant (appellant) or at least counsel to examine the presentence report for purposes of preparing the appeal. If this is the only disclosure, it is in a controlled setting. However, if appellate courts review the substance of sentence imposed by trial judges, it may be necessary to discuss the reasons why the trial judge erred, in the case of a reversal. This would make the report public to the extent that the appellate court discussed the report in its opinion. Under those circumstances the appellant (defendant) might very well choose not to appeal the presentence report contained extremely sensitive information which the appellant did not want disclosed to the public under any circumstances.

One of the major debates about the disclosure of the report focuses on whether confidentiality is necessary to preserve the sources of information. The responding judges provided a mixed set of answers on the effect of confidentiality on the quality of the presentence report. Some judges indicated that the less confidential, the poorer the quality of the report. Other judges indicated that if the probation officer knew the report would be subjected to some scrutiny, then the report submitted would be of higher quality.

The supposed decline in the utility of the presentence report if confidentiality cannot be maintained is unclear, since it appears that a number of judges allow probation officers to submit a separate, confidential section of the report, or discuss the sentence recommendation informally with the officer, off-the-record, before dealing with the report and the formal sentencing process. However, some judges felt that disclosure of the report (even if with the sources excised by the judge or at the request of the probation office) improved the quality of the report, by reducing the amount of opinion which the report contained. In that light, the judges suggested that examination of the report by others made probation officers reluctant to present much other than the facts in the report.

I believe that knowledge on the part of the probation officer that the report will be scrutinized not only by myself, but by defense counsel and by the prosecutor, enhances the quality of the report. The prospective examination by the prosecutor in-

sure that the report will not reflect in partisan fashion the contentions of the defendant, nor will it display inordinate sympathy for the defendant. Conversely, knowledge that the defendant and particularly defense counsel will scrutinize the report insures that it will constitute a verbatim reflection of a prosecutorial posture. Knowledge that both defense counsel and the prosecutor will examine the report (and thereafter be in a position to attack it) also tends to encourage the probation officer to be very sure of facts he reflects in the report.

Apparently other judges have overcome any limitation on information or recommendations which scrutiny of the report produces by conducting oral conferences with the officer preparing the report, and allowing the probation officer to include a page of confidential evaluation and recommendations. Furthermore, the degree to which the probation office controls the material in the report which is released to the parties, would suggest that there would be little realistic danger to the probation officer from the lack of complete confidentiality. However, if the judge, in practice, always released the entire report (except the sentence recommendation) or made his own decisions about what material to excise, then the probation office might be quite reluctant to place much in the report that was not a recital of the facts surrounding the defendant.

A large portion of judges found little or no difference between the quality of the presentence reports made before and after the 1975 change in the rule which allowed disclosure to the defense. This may be the result of the probation office involved and the agency's evaluation that the report should contain the same material as it used to. It may also be due to the judge's use of the report and the confidence which he places in the work of his probation officers.

Several judges specifically stated that they saw no evidence that the probation officer's sources of information had dried up as a result of the disclosure of the report to the defense. This is one of the primary arguments against disclosure, and what little empirical evidence has been gathered suggests that sources have not dried up.¹⁰⁹ One judge suggested that the problem of confidentiality and the need to protect one's sources had been worked out carefully and successfully by the probation officer and himself. Another judge indicated that any problem relating to disclosure of sources relating to a report is worked out on a case-by-case basis with little difficulty. Thus, he did not feel that the disclosure of the report had hurt the probation officer's sources of information.

Federal Probation Officers

Several conclusions can be drawn from the responses of federal probation officers. These responses reveal an "agency orientation" to the

¹⁰⁹See *supra* note 29 and accompanying text.

report and its disclosure. Most probation officers who responded¹¹⁰ indicated that the presentence report (which they viewed as their "work product") was done for the judge and its purpose was to assist him in sentencing the defendant. Thus, they frequently indicated that the judge controlled access or set the policy for access to the report. Nearly unanimously, the responding probation officers indicated that the report was a confidential document, which could not and would not be released to the public. Uniformly, they indicated that the defendant or his counsel, the U.S. Attorney, and the judge could see the report prior to sentencing. After sentence was imposed, a number of probation officers indicated that the Bureau of Prisons and the Parole Commission could inspect the report as a matter of course. Most also indicated that other appropriate agencies (those which had some control over the defendant) could gain access to the report. However, the usual procedure for this involved formally petitioning the court to allow the agency to inspect the report. As a matter of course, these requests were honored, by the probation office.

In addition, the prisoner, at the time of parole consideration, has a statutory right to see the presentence report—more accurately, the prisoner must have "reasonable access" to the materials used by the Parole Commission in reaching its decision.¹¹¹ Thus, after the sentence has been imposed, the criminal may see the entire report—even the sentence recommendation. It was unclear from the responses whether the confidential sources of the information in the report were withheld from the prisoner at the time of parole consideration. However, it is quite possible that this portion of the report would be withheld, since the reason for its initial excision does not disappear after sentencing.

The probation officers also indicated that the presentence report would be supplied to law enforcement officers in the case of the prisoner who became a fugitive, or in the case where the criminal was under investigation for other alleged criminal activity. This practice seems to violate the defendant's privacy, in the sense that the friends, and other contacts which the probation officer used to prepare the report, as well as the private information provided by the defendant for the report, would become involved in a subsequent criminal investigation which is certainly beyond the purpose for which the information and sources were collected in the first place. It is not always clear from the judge's comments whether disclosure of the report in this case is tied to the subject's involvement in an investigation, or whether the report might be disclosed if it related to third parties who were suspects in a criminal investigation. "If the client [prisoner] becomes a fugitive, verbal information can be given to law enforcement that may lead to his arrest (identify

¹¹⁰The request was sent to the Chief Probation Officer for each district. In several cases, this was referred to an assistant or a probation officer for reply. Throughout the textual discussion respondents will be referred to as "probation officers."

¹¹¹18 U.S.C. §4208(b),(c) (1976).

information, addresses, etc.). . . . [I]t [the presentence report] may be disclosed to law enforcement agencies when they are concerned with an active criminal investigation."

A few probation officers indicated that they might share the presentence report with other courts, especially state or local courts, dealing with the same individual. The probation officers indicated that this was done on a reciprocating basis and its primary purpose was to reduce the amount of investigative work both probation agencies (state and federal) had to do for one defendant. Exactly how this exchange was worked out and what sort of judicial supervision existed over it is unclear. However, it is likely that a good deal of informal disclosure may take place if the probation offices involved trust one another, and they are certain of maintaining the privacy of the information within the judicial or probation context.

The probation officers pointed out two types of disclosure which are not presented so clearly from the district judge's responses. First, many probation offices will regularly disclose the presentence report, after sentencing and during rehabilitation, to a variety of agencies, which go beyond the prison and probation systems. Thus, half-way houses, and other social service agencies may be allowed to examine the presentence report. This apparently is done sometimes after a formal request to the court of the probation office, or after written permission has been given by the client (prisoner). "With the client's permission we will reveal the presentence report to such agencies as the Vocational Rehabilitation Commission who [sic] need the information to service the client. This is done after approval from the court." These practices seem to be oriented strongly toward serving the prisoner in a helpful fashion, in most cases. Furthermore, the release of the information may not be complete, and it usually follows a request by the prisoner for its release, or at least his permission.

This disclosure to outside agencies—other than prisons or probation officers—may be controlled or protected by several mechanisms. In the first instance, it would appear that the court must approve the disclosure. In nearly all responses, the probation officers indicated that the presentence report was under the control of the court, and release of it must follow court approval, whether *pro forma* or not. In addition, it would appear that the subject of the report, the prisoner, has some control over disclosure, and may have the report released if he wishes some agency (or some prospective employer) to examine it. This approval by the prisoner presumes that he knows what is in the report—which may not be the case— and that disclosure of the report will be beneficial to his efforts.

The confidentiality of the contents of the presentence report may not be absolute, especially as an increasing number of agencies and individuals have some possible access to the report. It could be argued that the contents of the report are not so confidential once the sentence has

been imposed and is being executed. Thus, even the prisoner may have a statutory right to see the report during a post-sentencing proceeding (parole). However, one of the initial justifications for limited access to the report is the confidentiality of the sources of information, and the diagnostic and other evaluative materials contained in the report. These matters would still be in the report, after sentencing, and their delicacy may remain as great as before sentencing. It could be that post-sentence access is as controlled as presentence access, and the judge and/or probation office carefully excises the confidential information before the report is disclosed to the requesting agency. However, this is problematic, and may very well involve the disclosure of some information and sources which were initially considered confidential by the probation officer and the judge prior to sentencing.

One probation officer who responded made a very interesting point which should not be overlooked. That is, that the information contained in the presentence report may not be *all* the information which is collected by the probation officer during the presentence investigation. The officer, in preparing the report, may "sanitize" it by leaving out the more controversial information or the hearsay evidence, before it is submitted to the judge.

Not all information collected is recorded in the presentence report.... Therefore, only such information as can be disclosed to those parties [defendant, defense counsel, U.S. Attorney] is recorded in the presentence report.... Information collected by the probation officer during the presentence investigation which is not contained in the presentence report is ordinarily not assessable [sic] to anyone outside the probation office.

The material not included in the report may be even more sensitive than the "sanitized" information included in the report. The use of such information, however, is clearly limited to the parole office, and would have no impact on sentencing.

It is interesting to note that the probation officers who responded often indicated that they did not pledge or promise that the information supplied to them for the presentence report would be held in confidence. Since the report is disclosed to the parties, in most cases, and since the judge exercises control over the excision of information in the report, the probation officer cannot guarantee such confidentiality. Several officers indicated that this could be a problem, but that in nearly all cases the need for confidentiality could be established and carried out.

The second major item which the probation officers raised which the judges did not is that the presentence report may be the target of a subpoena duces tecum in related litigation arising out of the criminal prosecution. Thus, if the victim of a crime sues the criminal for damages, the probation officer may be subpoenaed to testify regarding the criminal-civil defendant, and asked to bring his presentence report along for purposes of reference or submission as evidence in the civil action. This kind

of use of the presentence report "negates the original intent of the report." However, this must be a continuing and increasing problem. One probation officer indicated that his office has a standard procedure for such subpoenas,¹¹² which usually results in the subpoena being quashed.

It would appear from this discussion that the probation office sees the presentence report in a different light than does the judge. From the agency's point of view disclosure to other agencies is and ought to be widespread, although there seems to be some question about the control over this disclosure. The major means of control is either to get formal court approval for disclosure, although some probation officers indicated that court approval came only for non-routine disclosure requests, or to obtain written permission from the criminal. How much information is released under these "controlled" situations is unclear.

PRESENTENCE REPORT DISCLOSURE PRACTICES: THE STATE COURTS

As noted in Appendix A the response rate for state court judges and state probation offices was low, and thus the analysis of state practices in relation to presentence report disclosure cannot be done with the depth and detail desirable. In fact, about all that can be done is to make summary statements which reflect general practices according to the responses.

Probably the most widespread statement about disclosure of the presentence report in state courts is that frequently the defense counsel and the prosecuting attorney are allowed to examine the report before the sentencing hearing. The purpose of this is to correct any misinformation which the report may contain. Some judges specifically stated that they do not allow defendants to see the report, but do allow the defense counsel to see the entire report. Most judges, however, disclose the report to the defense without the sentencing recommendation. Some judges indicated that even where the defendant cannot see the report, the judge assumes that counsel will at least discuss the information in the report with the defendant, if not show him the report. While most states seem to allow the defendant to see the report, some judges specify that they do not disclose the report to the defendant. This is usually the case only

¹¹²The Administrative Office of the United States Courts prepared a memorandum to all United States Probation Officers on the subject recently. The conclusion of the memorandum was that the presentence report (along with the probation report) is confidential and privileged, both from the probation officer's perspective (work-product privilege) and from the defendant's perspective (the privilege against self-incrimination). The memorandum, however, indicated that the case law is sparse, though generally in favor of a privilege. It furthermore indicated that a good deal of the case for confidentiality of the probation officer's work product is based on arguable points of privilege, and that the law is not as clear as it should be. The disclosure of the report in contexts other than those mandated by the rule is contrary to "sound public policy." Reid, *Amenability of Federal Probation Officers to Court Process with Respect to Presentence and Probation Reports* (mimeo, n.d.).

where the statute gives the judge discretion over the disclosure of the report prior to sentencing, and the judge has had some difficulty in instances where the report was disclosed to the defendant.

In most states, the presentence report is not made part of the court record, at least as far as public disclosure is concerned. As is the practice in the federal courts, most often the presentence report is attached to the court record, or the case file, but it is sealed from public scrutiny, and only the judge, upon motion, can release the report. Usually this release is automatic—even required by statute—with regard to state agencies involved in the treatment of the criminal after sentence. Some judges indicated that only an appellate court would be able to review the presentence report, except for the agencies involved with the criminal. Others indicated that disclosure to anyone other than the parties would require a petition to the court for disclosure. There is some qualitative difference between these two practices. In the first instance, only another court could see the report, however, in the second instance, it would be possible, at least, for third parties of one sort or another, if they could convince the judge of their “need-to-know” the contents of the report, to have access. The judges who indicated that they would entertain motions for the release of the report also indicated that they had few, if any, such requests, and they did not specify the grounds which would justify disclosure of the report.

One generalization which seems to be warranted from the responses and discussion provided by the questionnaire is that courts which operate under recent statutes (less than five years old) have much more specific provisions regarding presentence report disclosure, generally disclose to the parties in the case, and then seal the report from public scrutiny. They also can be more explicit about their disclosure practices. On the other hand, states which have not recently gone through statutory revisions regarding sentencing or the criminal process, illustrate more variation in practice, and frequently permit the decision to disclose to be based solely on the judge’s discretion. Responding judges from these states were rather vague about their practices. This statement also holds for those states in which the state supreme court has recently changed the rules of procedure, or has adjusted procedure by court order. In such instances, the recent rules specify treatment of the presentence report similar to the federal rules of disclosing, to the defense, the factual content of the report prior to sentencing. The older practices, which a number of states still follow, may or may not permit the defense to examine the report. Furthermore, they may or may not specify that the report is to be sealed after sentencing.

Most of the responses from state probation officers suggest the same kind of orientation that federal probation officers indicated. That is, the probation office supplies the judge with the report, because that is the agency’s function, and the judge then controls access to the report. Most of the offices specify the law as dominant, where it is specific with regard

to confidentiality or control over access to the report. However, even where the state statute does not indicate that the report is confidential, some probation officers specified that they "considered" the report confidential and left disclosure to the judge, rather than determining a disclosure policy on their own. While the responding probation officers did indicate that other state agencies did or could easily obtain copies of the report, most indicated that the report was not disclosed, and should not be disclosed to the public.¹¹³

It would be most tenuous to discuss the practices of the state courts in detail based on the responses to the questionnaire. It is even tenuous to make the generalizations which have been offered in this section. From the discussion of presentence disclosure policies, it is possible to see the differences among states with regard to the statutory treatment of the presentence report. The responses from state judges support the conclusion that regardless of the statutory wording, the practices of judges tend toward some sort of disclosure to the defense for purposes of ensuring the accuracy of the facts in the report. Exactly how that disclosure is accomplished and with what protections to the information in the report, is problematic and undoubtedly depends on the individual judge, the probation office's practices, and the state's statutory provisions.

CONCLUSIONS

This study focuses on the questions of confidentiality of personal material in a closed and controlled situation, the presentence report. The use which is made of the report's information is specifically limited by court or statutory provisions. This is much different from the situation in which a person's employment records or health records are involved and subjected to various kinds of access. However, even in this closed situation, the questions which are raised are central to the issue of privacy of personal information.

¹¹³The Virginia provisions are somewhat unique, *supra* note 69. The response from the Virginia Department of Corrections indicated the peculiar quirks in the confidentiality of the presentence report. *Anyone* can see the report during the presentence stage, as long as the person knows how the case is filed. After sentencing, however, the report is confidential and is no longer available to the public, apparently because then the probation office controls the report.

The presentence report is filed with the court records and is available in the office of the Clerk of the Court with all the other records pertaining to the trial. The Department of Corrections and this Division (Parole and Probation) treats this information as confidential and do not disclose these reports without the consent of the person involved after the court hearing. This means that anyone can view the report at the local courthouse if they are familiar with local filing procedures.

This situation seems to be rather strange and such disclosure should be eliminated. The state agency involved clearly does not release the information, but the report is vulnerable to public inspection for a period after its preparation, and before the probation office gains complete control of the report.

The issue of privacy of presentence reports is in a state of flux. While there was a major effort in the mid-1960's to open the report to examination by defendant and defense counsel, the movement in this direction is still going on. There is a balance between the extremes of complete secrecy and complete public disclosure in the case of presentence report practices. This balance weighs the rights of the individual convicted of a crime against the interests of society in singling out the individual for unique treatment. The balance which has been struck by jurisdictions ranges from nearly one extreme to the other. Complete public disclosure is permitted or required in some states, while in some jurisdictions disclosure to the defense is not even required. However, most jurisdictions have reached some sort of middle position which allows limited disclosure to the defense, and severely limits any further disclosure.

While most judges seem to accept the need to disclose the report to these parties, they may not have a statutory basis for doing so, and thus rely on their own discretion. The widespread practice appears to be to disclose the report to the defense, and in nearly all cases this means the entire report, except for the sentence recommendation. The purpose of this disclosure depends on the judge, and some feel that disclosure is necessary for due process reasons or because it is fair to the defendant to disclose the report. However, a good many judges disclose the report to the defense for the more immediate purpose of ensuring the accuracy of the report, and thus ask the defense to point out facts which are questionable and need more investigation. No judge indicated that the reason the presentence report was disclosed to the defense was because the defendant was the subject of the report and thus needed to know the contents in order to control the information about him.

Developments in this area have not reached the end point of uniform disclosure in all cases. This evolution may take substantially more than another decade if the current direction and rate of change is maintained. Some states continue to operate with statutes that are decades old, and have gradually adapted these by use of judicial discretion or case law, in the direction of more disclosure. These states change at a very slow pace, and continued change in many of these states will require a number of years.¹¹⁴ Other states have adopted major statutory revisions recently which move those states much closer to the position of complete disclosure.

From the responses to the questionnaire it is evident that judges and

¹¹⁴One example of this kind of change, which illustrates both gradual and abrupt movement in the direction of disclosure is Idaho. In 1968, the Supreme Court held that defendant had a right to disclosure of the presentence report, or sufficient information about adverse matters so that defendant can offer "intelligent refutation." *State v. Rolfe*, 92 Idaho 467, 473, 444 P.2d 428 (1968). Recently, the statute was rewritten to provide fairly elaborate procedures for a mitigation/aggravation hearing in cases involving the death penalty. IDAHO CODE, 19-2515(c)(1977 Supp.). The state will probably operate with this sort of combination of case and statutory law for some years to come.

probation officers do pay attention to the privacy aspects of the presentence report. Judges seem to be quite sensitive and most careful about releasing the contents of the presentence report because of the nature of the information in the report. They use a variety of techniques to control the report, but their objective is nearly uniform in the direction of ensuring that the highly personal information in the report is not disclosed to others. On the other hand, probation officers consider the report confidential, but not so much from the perspective of the defendant, as from the agency's need to protect its work product. It would appear that the practices of a number of probation offices, especially with regard to disclosure of the report after sentencing, permit the opportunity for many people and agencies not directly concerned with the sentencing process to have access. The broader the scope of possible disclosure the greater the likelihood of inappropriate disclosure. Two important limitations of this inappropriate disclosure are the judge's ability to supervise requests for disclosure and the need to obtain the subject's approval for disclosure of the presentence report. To the extent that these controls are effective, the potential for invasion of the subject's privacy would be small. This bureaucratic dimension of the control of the presentence report warrants closer attention in the future.

APPENDIX A

QUESTIONNAIRES

The questions presented to the various officials sampled in this study are presented below. The quotations used in the text are verbatim responses from various officials. The respondents were guaranteed anonymity, so those statements are not identified with particular individuals.

The samples for each of the four categories of officials surveyed for this study are presented in the table below. The samples were random, and the size of the sample was intended to provide a good cross-section of responses.

	Number Sampled	Number Responding	Response Rate
Federal Judges	232	69	29.7%
Fed. Prob. Off.	91	37	40.6%
State Judges	264	50	18.5%
State Prob. Off.	50	24	48.0%

Questions posed to federal district judges and state trial judges:

1. What use do you make of the presentence report?
2. Do you allow the defendant or defense counsel to see the report? Under what circumstances? Why?
3. Do you allow anyone else to see the report? Why? At what stage of the process? For what purpose? What portions of the report can they see? Explain.
4. By what means is the report revealed? A written summary, excerpts, or the entire report? Is it read in chambers or in open court?
5. Is the report made a part of the court record in the case?
6. Do you follow the same procedures in all cases you handle? Explain.
7. What effect does confidentiality or the lack of it have on the quality of the report?

Questions posed to federal and state probation officers:

1. What sources of information do you utilize in preparing the report? Do you pledge confidentiality?
2. What sort of information do you include in the report?
3. Who has access to the information you collect? Under what circumstances? Explain.
4. What procedures are used to verify the information in the report?
5. Who has access to the report itself? Explain.
6. Do you maintain a file of all presentence reports your office prepares? For what purposes?
7. Are these procedures true for all the probation officers in your jurisdiction?